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In The Supreme Court Of The United States

OCTOBER TERM, 1967

No. 248

MARYBELLE LOUISE O'BRIEN, PETITIONER,

v.

SOCONY MOBIL OIL COMPANY, INC. (SUCCESSOR TO VIRGINIA-CAROLINA CHEMICAL CORPORATION), RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY AND TO THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF FOR SOCONY MOBIL OIL COMPANY, INC., IN OPPOSITION

OPINIONS BELOW

The opinion of the New Jersey Superior Court, handed down December 6, 1963, appears as Appendix A to the Petition for Certiorari (Pet. Cert. 1a). A supplemental letter opinion, dated January 16, 1964, appears at Pet. Cert. 14a. A transcript of the judge's oral opinion on March 20, 1964, appears at Pet. Cert. 16a, and orders of March 23, 1964, at Pet. Cert. 19a and 21a.

The opinion of the New Jersey Supreme Court reversing the judgment of the Superior Court, dismissing O'Brien's complaint, and remitting her to the courts of Virginia is reported at 44 N.J. 25, 206 A. 2d 878 (1965), and appears at page 20 of Record No. 6293, the red-covered record filed in

the Supreme Court of Appeals of Virginia (nine copies of which were filed in this Court with the Petition for Certiorari). The judgment of the Supreme Court of New Jersey appears at Pet. Cert. 24a.

An opinion of the State Corporation Commission of Virginia, October 21, 1965, rendered at the time the Commission certified the record for O'Brien's appeal to the Supreme Court of Appeals of Virginia, appears in Record No. 6293, p. 36.

The decision of the Supreme Court of Appeals of Virginia, dated January 16, 1967, dismissing O'Brien's appeal, is reported at 207 Va. 707, 152 S.E. 2d 278 (1967), and appears at Pet. Cert. 26a. The Court's order of dismissal appears at Pet. Cert. 45a.

The order of the New Jersey Supreme Court, dated March 21, 1967, denying O'Brien's motion to vacate the New Jersey court's previous dismissal of O'Brien's complaint appears at Pet. Cert. 46a.

JURISDICTION

The final order of the New Jersey Supreme Court denying petitioner's motion to vacate the New Jersey court's previous order dismissing petitioner's complaint was entered March 21, 1967. The order of dismissal of the Supreme Court of Appeals of Virginia was entered on January 17, 1967, and the time for filing a petition for certiorari to the Virginia court was extended by Mr. Chief Justice Warren to June 15, 1967.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(3), claiming a right under the United States Constitution.

Respondent does not deny the Court's technical jurisdiction under section 1257(3), but it submits in the argument which follows that there are independent and adequate

state grounds of decision below which the Court should find sufficient to preclude review of this case.

QUESTIONS PRESENTED

1. Whether the dismissal by the Virginia Supreme Court of Appeals of petitioner's appeal as being out of time under applicable Virginia statutes and rules, and the refusal of the New Jersey Supreme Court (having already dismissed) to reopen the case after the Virginia dismissal, ought to be found by this Court to furnish an independent and adequate state procedural ground for the judgments below.

2. Whether the conclusions of the Virginia Supreme Court as to the interpretation of a Virginia corporation's charter and, as an alternative ground of decision, as to the nature of accrued but undeclared dividends under Virginia law, constitute independent and adequate state grounds of substantive law such that there is no occasion to reach the questions of federal constitutional law raised by petitioner.

3. Whether, in a state which reserves in its constitution the power to amend its general corporation laws so as to allow a corporation by vote of the requisite percentage of shareholders to affect relationships between the corporation and its shareholders, a corporation may, under the authority of state law, recapitalize so as to exchange new securities for arrearages in accumulated (but undeclared) preferred dividends, over the objection of a preferred stockholder that the arrearages represent "vested" rights protected by the Due Process and Impairment of the Obligation of Contracts Clauses of the Federal Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, AND CHARTER PROVISIONS INVOLVED

Relevant provisions of the Virginia Constitution, of the Virginia Code, of the Rules of the Supreme Court of Ap-

peals of Virginia, and of the charter of Virginia-Carolina Chemical Corporation appear in the Appendix to this brief in opposition, *infra*, pp. 22-27.

STATEMENT OF CASE

After unsuccessful challenges in the courts of New Jersey and Virginia, petitioner seeks to have this Court overturn, on due process and impairment of the obligation of contracts grounds, the 1962 recapitalization of Virginia-Carolina Chemical Corporation which was effected by charter amendment under the Virginia Stock Corporation Act.

Virginia-Carolina (V-C)[1] was organized as a Virginia corporation in 1926. From the beginning the corporation was unable to meet the full dividend requirements on its two classes of preferred stock, a 7% prior preference stock (retired in 1936) and a 6% preferred stock (shares of which petitioner O'Brien held at the time of the recapitalization in 1962). Over the years, low earnings, urgent needs for capital outlays, and legal limits imposed by lenders on the amount of net earnings and surplus which could be used to pay dividends, caused arrearages in dividends on the 6% preferred stock to mount to $90 a share by the time of the 1962 recapitalization.

The present Virginia Stock Corporation Act became effective on January 1, 1957. Section 13.1-55(k) of that Act provides that a corporation may amend its charter so as to "cancel or otherwise affect the right of the holders of the shares of any class to receive dividends which have accrued but have not been declared (whenever accrued and wheth-

[1]On November 29, 1963, V-C was merged into Socony Mobil Oil Company, Inc., a New York corporation. Socony Mobil later changed its corporate name to Mobil Oil Corporation. For simplicity, references throughout this brief are to "V-C," since all of the relevant facts in the case (save the more recent judicial proceedings) took place before the 1963 merger.

er or not earned)." Section 13.1-56 adds the requirement that such amendment must receive the affirmative vote of the holders of more than two-thirds of the shares of each class of shares entitled to vote on the amendment as a class and of the total shares entitled to vote.

Prior to January 1, 1957, petitioner O'Brien became the owner of 100 shares of the V-C 6% preferred stock. In 1962 the directors proposed to the stockholders that the company recapitalize and that, among other things, each share of the 6% preferred stock, together with the accumulated dividend arrearages thereon, be converted into a recapitalization package consisting of one share of V-C common stock, 1.3 shares of a new 5% $50 par value prior preferred stock, and one share of a new 5% $50 par value convertible preferred stock (convertible into 1.1 shares of V-C common stock).[2]

On August 24, 1962, V-C mailed a notice of the proposed amendment to the certificate of incorporation to the stockholders, the notice being accompanied by a proxy statement and the full text of the proposed amendment. Petitioner was represented by proxy at the annual stockholders' meeting on September 28, 1962, made known her opposition to the proposed plan, and voted against it. The plan was approved, however, with about 89% of the common shares and 72% of the preferred shares voting for it. The amendment had therefore received the requisite favorable vote of more than

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[2]The exchange has been unquestionably to the advantage of the former holders of the old 6% preferred stock. Had the old preferred stock continued in existence to, say, March 31, 1966; it could have been called by V-C for a call price of $194.85. By contrast, on March 31, 1966, the value of the recapitalization package, on the basis of New York Stock Exchange quotations, stood between $292.11 (low) and $296.84 (high). (Valuation statistics through March of 1966 were presented to the Virginia Supreme Court in Appellee's Brief, frontispiece graph, pursuant to Stipulation in the Virginia Record, R. 52-53.)

two-thirds of the total outstanding shares of stock as well as more than two-thirds of each class of stock, including the 6% preferred. Accordingly the State Corporation Commission issued a certificate of amendment.

Petitioner made no effort to challenge the amendment either before the Commission or in the Virginia courts, either of which, under Virginia law, she could have done. (See section I of the Argument, *infra*). Rather she filed a civil action against V-C in the Superior Court of New Jersey. She did not question V-C's right to recapitalize nor its right to affect such dividends as might have accrued since January 1, 1957, the effective date of the Virginia Stock Corporation Act. But she claimed to have a "vested" property right to the arrearages in dividends which had accrued—but had not been declared—prior to January 1, 1957. She argued there (as she argues here) that this property right could not be affected over her objection without a taking of property without due process and an impairment of the obligation of contracts in violation of the Federal Constitution. The Superior Court gave judgment for petitioner, holding that she did have a "valid and subsisting property right" in the accrued but undeclared dividends. (Pet. Cert. p. 21a.)

On appeal, the Supreme Court of New Jersey reversed the judgment of the Superior Court and dismissed O'Brien's complaint. The ground for dismissal was comity: the New Jersey court said there were "cogent" reasons for believing Virginia to be the "more convenient forum" for this action—particularly, the fact that Virginia corporation law was controlling and the fact that only Virginia could lay down a uniform rule which could be followed in other states where suits might be brought against V-C. Accordingly the New Jersey court remitted O'Brien to the Virginia courts and conditioned its dismissal on V-C's waiving its right to invoke such time limitations as might be available to it

under Virginia law and on the appropriate Virginia court's accepting jurisdiction of the case and rendering a decision on the merits. (R. 34-36.)

Petitioner proceeded in Virginia by way of an appeal to the Supreme Court of Appeals of Virginia from the 1962 order of the State Corporation Commission issuing the certificate of amendment to V-C. After briefs on the merits had been filed in the Supreme Court of Appeals, the court requested supplemental briefs and preliminary oral argument on the question of the court's jurisdiction. When it handed down an opinion, the court observed that the appeal had not been taken within the time period specified by the governing rules of court and by Virginia statutes, requirements which the court held to be "mandatory or jurisdictional." Therefore the court dismissed the appeal for want of jurisdiction. (Pet. Cert. 28a, 44a, 45a.)

O'Brien sought to have the case reopened in the Supreme Court of New Jersey, but that court, without opinion, denied O'Brien's motion to vacate the court's earlier order of dismissal. (Pet. Cert. 46a.) O'Brien now seeks certiorari to both the Supreme Court of New Jersey and the Supreme Court of Appeals of Virginia.

ARGUMENT

I. The dismissal by the Virginia Supreme Court of Appeals of petitioner's appeal as being out of time under Virginia statutes and rules, and the refusal of the New Jersey Supreme Court to reinstate the case after the Virginia dismissal, furnishes an independent and adequate state precedural ground for the judgments below, precluding petitioner from seeking review in this Court.

As the Supreme Court of Appeals of Virginia found, petitioner O'Brien had actual notice of the stockholders' meeting of September 28, 1962, and of the proposed amendment to V-C's charter, appeared by proxy at the meeting,

and voted against the amendment. (Pet. Cert. 33a.) Section 13.1-59 of the Virginia Stock Corporation Act put her on notice that the State Corporation Commission, if it found the amendment complied with the requirements of law, would issue a certificate of amendment. As the Virginia court pointed out, O'Brien could, under the Commission's Rules of Practice and Procedure, have asked for a hearing on her claim that the amendment did not comply with the requirements of law. (Pet. Cert. 35a.) She did not ask for a hearing.

Moreover, O'Brien failed in 1962 to invoke the right available to her under Virginia law to appeal the order of the Commission issuing the certificate of amendment. Section 12-63 of the Virginia Code gives to "any party aggrieved" by a final order of the Commission the right of appeal to the Supreme Court of Appeals, so long as the appeal is taken and perfected within four months. The Supreme Court of Appeals has observed that the present Virginia Constitution evinces "a very liberal attitude towards appeals from orders of the Corporation Commission" and has held that the Code section just cited gives "aggrieved persons" the right to appeal even though they may not have been parties to the proceedings before the Commission. *Jones* v. *Rhea,* 130 Va. 345, 359, 107 S.E. 814, 819 (1921). Thus what may have been, as to the aggrieved party, an *ex parte* hearing before the State Corporation Commission becomes a full-blown adversary hearing on the merits before the Supreme Court of Appeals.

That a stockholder in O'Brien's position would in fact be allowed to take such an appeal to protest amendment to a corporation's charter is evidenced by the leading Virginia case of *French* v. *Cumberland Bank & Trust Co.,* 194 Va. 475, 74 S.E. 2d 265 (1953). French, like O'Brien, was opposed to a charter amendment. Like O'Brien, French was

outvoted. As in the present case, the State Corporation Commission issued a certificate of amendment. French, unlike O'Brien, appealed that order to the Supreme Court of Appeals, which heard the case on the merits. O'Brien could have done, but did not do, the same thing.

When O'Brien finally, in 1965, did take an appeal to the Supreme Court of Appeals, the forum which the New Jersey Supreme Court thought the proper one for this case, V-C waived its right to invoke any time limitations upon the appeal, and it urged the Virginia court to decide the case on the merits and filed a brief in support of the court's jurisdiction to render a decision on the merits. Nevertheless, the Virginia court dismissed on the ground that the appeal was out of time. The Supreme Court of Appeals has never allowed an out-of-time appeal in a civil case.[3] (The Virginia court distinguished appeals in criminal cases, which, because they involve constitutional rights of persons convicted of felonies, are a special instance.) The Virginia Code says flatly that appeals from the Corporation Commission must be taken and perfected within four months. Va. Code Ann. §§ 12-63 (Repl. vol. 1964), 8-489 (Supp. 1966), 8-463 (Repl. vol. 1957). The Supreme Court of Appeals has held the four-month requirement to be an express limitation, "a mandatory and jurisdictional requirement" which cannot be waived. *Condrey* v. *Childress,* 203 Va. 755, 757, 127 S.E.2d 150, 152 (1962).

The Supreme Court of Appeals must have recognized the situation in which a mere refusal of jurisdiction would have

[3]In the Supreme Court of Appeals of Virginia, respondent, in compliance with the terms of the New Jersey Supreme Court's order of dismissal, joined with petitioner in arguing for the jurisdiction of the Virginia court. But this argument was made in the face of the relevant statutes and cases, which pointed the other way and on which the Virginia court relied in dismissing the appeal.

put the New Jersey Supreme Court. Consequently, it wrote a detailed opinion setting forth its conclusions as to Virginia law on all of the substantive questions involved in this case except the question as to the power of the New Jersey courts to hear the case. Each of those questions was answered adversely to O'Brien. While the precise holding of the Virginia court was that it lacked jurisdiction to hear the appeal because the applicable time limits had not been observed, nevertheless, this conclusion was reached only after a determination that no constitutional right had been violated. The Virginia court had previously determined that the time limit on appeals would bend to overriding constitutional requirements in certain criminal cases. There was, however, no necessity to bend the jurisdictional rule in the instant case because of the Virginia court's holding that "Miss O'Brien has been denied no constitutional right." (Pet. Cert. 37a.)

Even if the Virginia dismissal should be regarded as a purely procedural determination, however, it was still proper. This Court has held that a party must follow state procedures in the invocation of federal constitutional rights, so long as the state practice "gives to the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by that court." *Central Union Tel. Co.* v. *Edwardsville,* 269 U.S. 190, 194-95 (1925). It is, of course, for this Court finally to determine whether failure to follow the state procedure should operate as a bar to this Court's review. See, *e.g., Parker* v. *Illinois,* 333 U.S. 571, 574 (1948); *Henry* v. *Mississippi,* 379 U.S. 443, 447 (1965).

The Virginia rule governing appeals from the State Corporation Commission satisfies the requirements laid down in this Court's decisions for an independent and adequate state procedural ground. Time limits, especially where in-

voked years after the event, serve an obvious "legitimate state interest." See *Henry* v. *Mississippi, supra.* The liberality of section 12-63 of the Virginia Code in allowing "aggrieved" parties to appeal and the interpretation given that section by the Virginia court in *Jones* v. *Rhea, supra,* gives ample opportunity for federal constitutional questions to be raised (as French did in *French* v. *Cumberland Bank & Trust Co., supra*). There is no suggestion of unreasonableness of the rules or their application. Compare *NAACP* v. *Alabama ex rel. Flowers,* 377 U.S. 288 (1964); *Shuttlesworth* v. *Birmingham,* 376 U.S. 339 (1964) (per curiam). The four-months limit has been consistently applied; thus there has been no "novelty" or surprise in its application here. Compare *NAACP* v. *Alabama ex rel. Patterson,* 357 U.S. 449 (1958).

The Supreme Court of New Jersey obviously thought that an important question of Virginia corporation law ought to be settled in the Virginia courts. (See section II of the Argument, *infra.*) The Supreme Court of Appeals of Virginia dismissed the case, following clearly articulated and consistently applied Virginia procedural rules. The New Jersey court, by refusing to reopen the case, showed that it concurred in this disposition of the case. By reason of the detailed conclusions in the opinion of the Supreme Court of Appeals covering the merits of the controversy, the New Jersey Supreme Court was, in effect, informed that the outcome of the case would be the same whether it was determined on procedural grounds or on substantive grounds.

These actions having been taken by the Virginia and New Jersey courts, it would be appropriate for this Court to apply the "familiar principle" of there being an "independent and adequate state ground" of procedural law to support the judgments below. *Henry* v. *Mississippi, supra,* at 446.

II. The decisions below rest on two independent and adequate grounds of state substantive law, namely (1) the Virginia court's interpretation of the V-C charter as reserving power to alter stockholder rights under future laws, and (2) the Viginia court's finding that no right to accrued but undeclared dividends ever "vested" in O'Brien as a matter of Virginia corporation law.

Petitioner's claim, in this Court as in the courts below, is that she had a "vested" right in the accrued but undeclared dividends such that to alter or abolish that "right" by charter amendment without her consent denied her rights protected by the Due Process Clause of the Fourteenth Amendment and the Impairment of the Obligation of Contracts Clause of Article I, Section 10 of the Federal Constitution. However, before any such argument of federal constitutional law can be made, it must be found that, as a matter of state law, petitioner in fact had a property right or contract right in the first place. If no such property or contract right existed at state law, questions of federal constitutional law never come into play.

The Supreme Court of Appeals of Virginia, in its opinion in this case, found that under the express language of V-C's charter—O'Brien's "contract" with the corporation—no such "vested" rights as she now claims ever existed. (Pet. Cert. 38a.) Article 8, paragraph 11 of the V-C charter reserved to the company the right to "amend, alter, change, or repeal" any provision in the charter "in the manner now or hereafter provided by law." Further, Article 4, subdivision II, paragraph 5 expressly allowed the corporation, upon two-thirds vote of the preferred stock, to alter or change the preferences of that stock. More than two-thirds of the preferred shareholders did in fact vote for the amendment approved at the annual meeting of September 28, 1962.

Moreover, the Virginia court found that as a matter of corporation law O'Brien never had any right to demand payment of cumulated undeclared dividends and that therefore "she necessarily had no vested property right in undeclared dividends that accrued before January 1, 1957." (Pet. Cert. 41a.) Both of these questions—the interpretation of V-C's charter, and the nature of cumulated but undeclared dividends—are questions of state law, of the kind appropriately decided by a state court.

In order that the constitutional proscription against the impairment of the obligation of contracts may not be meaningless, this Court has the power to review a state court's determination of the existence and terms of a contract. But this Court has repeatedly held that it will defer to the state court's determination as to the meaning and effect of a contract unless that determination is "palpably erroneous," *Phelps* v. *Board of Educ.*, 300 U.S. 319, 323 (1937), or "manifestly wrong," *Hale* v. *Iowa State Board of Assessment and Review*, 302 U.S. 95, 101 (1937). Or, as the Court put it in another case, the Court examines the contract "only to make certain that the non-federal ground of decision is not so colorable or unsubstantial as to be in effect an evasion of the constitutional issue." *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 649, 654 (1942).

As with contracts, so it is with the determination of whether there ever existed, under state law, any "property" interest. This Court has often said that, so long as the state court's decision is not an evasion of the constitutional question, the Constitution "affords no protection to supposed rights of property which the state courts determine to be nonexistent." *Fox River Paper Co.* v. *Railroad Comm'n*, 274 U.S. 651, 657 (1927). *Accord: Demorest* v. *City Bank Farmers Trust Co.*, 321 U.S. 36 (1944) (where the New York courts had held that appellants had under New York

law no such property interests as they now claimed, the Supreme Court held that "appellants have no question for us under the Due Process Clause"); *Sauer* v. *New York,* 206 U.S. 536 (1907) (the controlling question was "whether the property which the plaintiff alleged was taken existed at all"; such question "must be for the final determination of the state court").

This Court's general policy of deferring to state courts' determination of the state law questions of contract and property law is reinforced, in the present case, by the well-established practice of courts in whatever jurisdiction (state or federal) of looking to the law of the state of incorporation in cases involving the relationships between corporations and their stockholders. Courts make this deference either by declining jurisdiction in a case involving the foreign corporation and its stockholder or, as is the more common practice today, by applying under choice-of-law principles the law of the state of incorporation. Professor Reese of Columbia has observed that it is "obviously desirable"[3] that "relationships *inter sese* of the corporation and its directors, officers, and stockholders" be governed by a single state's law.[4] Federal courts,[5] state courts,[6] the standard treatises on conflict of laws,[7] and the Restatements[8] all agree that that

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[3]Willis L. M. Reese and Edmund M. Kaufman, "The Law Governing Corporate Affairs," 58 *Colum. L. Rev.* 1118, 1125 (1958).

[5]E.g., *Perlman* v. *Feldmann,* 219 F. 2d 173 (2d Cir.), *cert. denied,* 349 U.S. 952 (1955); *Zahn* v. *Transamerica Corp.,* 162 F. 2d 36 (3d Cir. 1947); *Palmer* v. *Chamberlin,* 191 F. 2d 532 (5th Cir. 1951).

[6]*E.g., Bishop* v. *Middle States Util. Co.,* 225 Iowa 941, 282 N.W. 305 (1938); *Furst* v. *Beygeh,* 192 Minn. 454, 257 N.W. 79 (1934); *Newman* v. *Baldwin,* 13 Misc. 2d 897, 179 N.Y.S. 2d 19 (Sup. Ct. 1958); *Copeland* v. *Craig,* 193 S.C. 484, 8 S.E.2d 858 (1940).

[7]*E.g.,* Joseph H. Beale, *A Treatise on the Conflict of Laws* (New York, 1935) II, 895; Albert A. Ehrenzweig, *A Treatise on the Conflict of Laws* (St. Paul, 1962) § 147; *Dicey's Conflict of Laws,* ed. J. H. C. Morris (7th ed.; London, 1958), p. 480.

[8]*Restatement, Conflict of Laws* (1934) § 183, and comment A.

single state should be the state of incorporation. This, Judge Kaufman has observed, is a rule "well established and generally followed throughout this country." *Hausman* v. *Buckley,* 299 F. 2d 696, 702 (2d Cir.), *cert. denied,* 369 U.S. 885 (1962).

In this case the Virginia court, applying Virginia law, has found that there is no "vested" contract or property right. The V-C charter said that preferred stockholders should receive dividends "when and as declared by the board of directors of the corporation." (Pet. Cert. 29a note 3.) The Virginia court held that undeclared dividends "are not like a corporate debt. They are an expectancy, ripening into debt only when legally declared." (Pet. Cert. 40a.) In so holding, the Virginia court is directly in line with cases and commentators, who, like *Fletcher, Cyclopedia of Corporations* § 3688 (1964 rev. vol.), criticize the "unsound theory that the claim to accrued dividends is a vested right 'in the nature of a debt.' " (The "vested rights" theory is discussed further in section III, *infra.*)

Given the provisions of Virginia law and the general view of cases and commentators that accumulated but undeclared dividends are not "vested rights," it is difficult to characterize the Virginia court's determination of the questions of state law in this case as "palpably erroneous" or "manifestly wrong." It is even harder to make of the Virginia court's construction of the V-C charter anything but a question of state law. The Supreme Court of Appeals found that, without even looking to the State's general laws, the company's own charter gave it the power, with the concurrence of two-thirds of the outstanding preferred shares, to adopt the amendment eliminating accumulated but undeclared preferred dividends. This finding alone is enough to dispose of this case as having been decided on an adequate and independent state ground: a Virginia court's interpre-

tation under Virginia law of a Virginia corporation's charter.

There being under state law no "vested" contract or property right, the Due Process and Contract Clauses of the Federal Constitution do not come into play. As the judgments below rest on an adequate and independent state ground, there is no occasion for this Court's review. *Fox Film Corp.* v. *Muller,* 296 U.S. 207 (1935); *Broad River Power Co.* v. *South Carolina ex rel. Daniel,* 281 U.S. 537 (1930).

III. If one chooses to read the Virginia court's decision as having reached the merits (notwithstanding its order of dismissal), and even if one chooses to read the decision as resting, not on a determination of questions of state law, but on a determination of federal constitutional issues, still this Court should not grant certiorari, as petitioner has been denied no federal consitutional rights.

In the previous section, it was argued that the Virginia decision, in which the New Jersey court acquiesced, turned on a preliminary question of state law, precluding the need to reach any federal constitutional question. If, however, one chooses to treat the state and federal questions as inextricably intertwined, it remains that decisions of this Court support the conclusion that petitioner has been deprived of no rights under the Due Process or Impairment of the Obligation of Contracts Clauses.

From the time of Mr. Justice Story's concurring opinion in the *Dartmouth College* case, see *Trustees of Dartmouth College* v. *Woodward,* 17 U.S. 518, 675 (1819), it has been commonplace for states in their state constitutions to reserve the power to amend corporate charters. Virginia has made such a reservation in section 154 of its Constitution. As Fletcher points out, the effect of such a reservation is that corporations, "whether created by special acts or existing under general laws, must be held to accept their charters sub-

ject to such reserved power of amendment and repeal . . . ." 7 *Fletcher, Cyclopedia of Corporations* § 3668 (1964 rev. vol.). This reserve power is not limited to altering relationships between the state and the corporation; this Court has held again and again that under the reserve power "the relations between a stockholder or certificate holder and the corporation may be varied without impairing the contract existing between the corporation and its stockholder or member." *Veix* v. *Sixth Ward Bldg. & Loan Ass'n,* 310 U.S. 32, 40 (1940), citing a number of Supreme Court opinions.

However, the Court has from time to time spoken of "vested rights" beyond the reach even of the reserve power of a state. *Coombes* v. *Getz,* 285 U.S. 434 (1932), upon which petitioner places such reliance, illustrates a "vested right." Coombes was a creditor (not a stockholder) of Getz Bros. & Co., a California corporation. He brought suit against Getz, a director of the corporation, to recover the amount of a debt owed Coombes by the corporation. Coombes sought to base Getz's personal liability upon a provision of the California Constitution which made a corporate director personally liable to creditors of the corporation for moneys misappropriated during his tenure as director. While Coombes' suit was pending in the California court, the relevant provision of the California Constitution was repealed. The state court dismissed the suit. When the United States Supreme Court heard the case on certiorari, Getz argued that Coombes' cause of action, having been created by the state constitution, was subject to the power reserved to the state in another section of the constitution to alter or repeal laws pertaining to corporations. This Court rejected that argument, holding that the creditor's cause of action "had become fully perfected and vested prior to the repeal of the liability provision." 285 U.S. at 442.

Coombes, then, is an example of a genuine "vested right" —a relationship between the corporation and a *third party* which does not depend for its existence on the corporate charter and is not affected by the state's reserve power. Contrast the position of Miss O'Brien in the present case. She is not a creditor or a third party, but is a direct party to the contract between shareholder and corporation. Unlike the creditor in *Coombes,* whose right was perfected (only the amount of the sum owing remained to be determined), O'Brien never had a cause of action. The dividends were accrued but never declared. O'Brien had only a contingent right, an expectancy, subject at all times to the reserve power of the state to alter the general laws under which she held her shares.

This is the view of accumulated undeclared dividends which is currently accepted, with occasional exceptions, by cases and commentators. The New York Court of Appeals, for example, has said that "the right to accrued dividends, accrued merely by the lapse of time and not yet declared, is not a debt or a claim enforceable against the corporation." *Anderson* v. *International Minerals & Chem. Corp.,* 295 N.Y. 343, 351, 67 N.E. 2d 573, 577 (1946). And another oft-cited New York case has held that the New York legislature, acting under the reserve power to alter or amend the state's corporation laws, constitutionally can authorize a corporation, by a vote of two-thirds of the holders of each class of stock, to provide for a reclassification of its shares in such a way as to eliminate accrued but undeclared dividends, including even dividends which have accrued before the legislature so acts. *McNulty* v. *W. & J. Sloane,* 184 Misc. 835, 54 N.Y.S. 2d 253 (Sup. Ct. 1945).

Thus Fletcher sums up the present-day view by pointing out that courts "are now coming to see that there are no particular rights under the share contract which can be

separated and held to be constitutionally 'vested' against change. It is becoming evident that the concept of certain vested rights under the charter contract protected against the reserve power is illusory and that as far as the amending power is concerned, this can be found in or supplied by statute, at least in most states." 7 *Fletcher, Cyclopedia of Corporations* § 3688 (1964 rev. vol.). Petitioner gives a list of cases at page 16 of the petition for certiorari which are, for the most part, either obsolete or inapposite. For example, while the Delaware case of *Keller* v. *Wilson & Co.*, 21 Del. Ch. 391, 190 Atl. 115 (Sup. Ct. 1936), a recapitalization case (cited by petitioner), seemed to uphold the view that accumulated preferred dividends are "vested rights," the Supreme Court of Delaware in the later case of *Federal United Corp.* v. *Havender*, 24 Del. Ch. 318, 11 A. 2d 331 (1940), (not cited by petitioner) explicitly rejected the notion that accumulated dividends are "vested" and secure from alteration. Reviewing these Delaware cases, the Third Circuit has observed that "*Havender* broke *Keller's* back" and has held that the interest of the preferred shareholder in undeclared dividends "should not be given the status of a vested property right," in view of the state's reserve power. *Hottenstein* v. *York Ice Machinery Corp.*, 136 F. 2d 944, 950, 951 (3d Cir. 1943). Thus the "prevailing view" today in American courts is that interests of shareholders are fixed "only in the sense that they continue until changed by the vote of a specified majority in the manner provided by statute." See George D. Gibson, "How Fixed Are Class Shareholder Rights?" 23 *Law & Contemp. Prob.* 283, 291 (1958), which lists jurisdictions and decisions. (For a discussion of Delaware, New Jersey, and New York law, see pp. 73-90 of Brief for the Appellee in the Supreme Court of Appeals of Virginia.)

Petitioner's attempt to resurrect the notion of a shareholder's "vested rights," a jurisprudential relic rejected by cases and commentators alike, recalls the onetime use of substantive due process to impede state legislation dealing with economic and social problems. See, *e.g., Lochner* v. *New York,* 198 U.S. 45 (1905). The Court's present attitude to state regulation of the economy is reflected by the declaration in *Ferguson* v. *Skrupa,* 372 U.S. 726, 730 (1963), that the Court will not substitute its "social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

To adopt petitioner's "vested rights" argument would be to put vital aspects of corporate life beyond the power of remedial state legislation and to fly in the face of the Court's attitude to both the Due Process and Contract Clauses. Problems of corporate recapitalization are preeminently economic and call for legislative judgment as to what is needed to assure viable and healthy corporate financial structure. So long as the general laws of the state make it clear that shares are bought subject to the state's reserve power to amend corporate laws governing corporation-shareholder relations (as does section 154 of the Virginia Constitution), and so long as the rights of third parties are not involved, compare *Coombes* v. *Geiz, supra,* then this Court should adhere to the rule laid down in *Veix* v. *Sixth Ward Bldg. & Loan Ass'n, supra,* at 40 (relied on by the Virginia court in its decision in this case): "Under this reserved power, it is held that the relations between a stockholder or certificate holder and the corporation may be varied without impairing the contract existing between the corporation and its stockholder or member."

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

Constitution of Virginia

Constitution of Virginia Section 154 subjects corporations to the State's general corporation laws and makes their charters subject to future changes in state law:

> The creation of corporations, and the extension and amendment of charters (whether heretofore or hereafter granted), shall be provided for by general laws . . . . Such general laws may be amended or repealed by the General Assembly; and all charters and amendments of charters, now existing and revocable, or hereafter granted or extended, may be repealed at any time by special act.

Constitution of Virginia Section 158 establishes the means whereby existing corporations shall be brought under the State's general laws:

> Every corporation heretofore chartered in this State, which shall hereafter accept, or effect, any amendment or extension of its charter, shall be conclusively presumed to have thereby surrendered every exemption from taxation, and every non-repealable feature of its charter and of the amendments thereof, and also all exclusive rights or privileges theretofore granted to it by the General Assembly and not enjoyed by other corporations of a similar general character; and to have thereby agreed to thereafter hold its charter and franchises, and all amendments thereof, under the provisions and subject to all the requirements, terms, and conditions of this Constitution and of any laws passed in pursuance thereof, so far as the same may be applicable to such corporation.

Virginia Statutes

Va. Code Ann. Section 8-463 (Repl. vol. 1957) requires that appeals from the State Corporation Commission be taken within four months:

> No petition shall be presented for an appeal from, or writ of error or supersedeas to, any final judgment, decree, or order, whether the Commonwealth be a party or not . . . if it be an appeal from a final order, judgment, or finding of the State Corporation Commission which shall have been rendered more than four months before the petition is presented . . . .

Va. Code Ann. Section 8-489 (Supp. 1966) says that no process shall issue upon an appeal from the State Corporation Commission unless the petition and record are filed with the Supreme Court of Appeals within four months of the order appealed from:

> No process shall issue upon an appeal, writ of error, or supersedeas allowed to or from a final judgment, decree or order of any court or upon an appeal, writ of error or supersedeas allowed to a final judgment, order or finding of the State Corporation Commission, if, when the record with the petition required by law is delivered to the clerk of the Supreme Court of Appeals, there shall have elapsed four months since the date of such final judgment, decree, order or finding . . . .

Va. Code Ann. Section 12-63 (Repl. vol. 1964) allows "aggrieved parties" to appeal to the Supreme Court of Appeals from orders of the State Corporation Commission and sets a time limit of four months. It provides in relevant part:

> The Commonwealth, any party in interest or any party aggrieved by any final finding, order, or judgment of the Commission shall have, of right, regardless of the amount involved, an appeal to the Supreme Court of Appeals, which shall be taken and perfected within four months from the date of such final finding, order, or judgment.
>
> The Supreme Court of Appeals may, on petition of the Attorney General, or any other party so aggrieved,

if said petition be presented within four months from the date of the final finding, order, or judgment of the Commission, award a writ of supersedeas to any such final finding, order, or judgment, and may review, affirm, reverse, or modify the same, as justice may require, and enter therein such order as may be right and just.

Va. Code Ann. Section 13.1-55(k) (Repl. vol. 1964) allows corporate amendments cancelling accrued dividends:

> A corporation may amend its articles of incorporation, from time to time, in any and as many respects as may be desired, provided that the amendment may contain only such provisions as might be lawfully contained in original articles of incorporation at the time of making such amendment.
>
> In particular, and without limitation upon such general power of amendment, a corporation may amend its articles of incorporation, from time to time, so as:
>
> . . . .
>
> (k) To cancel or otherwise affect the right of the holders of the shares of any class to receive dividends which have accrued but have not been declared (whenever accrued and whether or not earned).

Va Code Ann. Section 13.1-56 (Repl. vol. 1964) sets out the procedure for having shareholders vote on proposed amendments. Subsection (c) provides:

> (c) At such meeting a vote of the stockholders entitled to vote thereon shall be taken on the proposed amendment. The proposed amendment shall be adopted upon receiving the affirmative vote of the holders of more than two-thirds of the shares entitled to vote thereon, except that if any class or series of shares is entitled to vote thereon as a class, the proposed amendment shall be adopted only upon receiving the affirmative vote of the holders of more than two-thirds of the

> shares of each class or series of shares entitled to vote thereon as a class and of the total shares entitled to vote thereon. The articles of incorporation may require a greater vote than herein prescribed ....

Va. Code Ann. Section 13.1-57(h) (Repl. vol. 1964) provides for class voting by shares whose accrued dividends are proposed to be cancelled:

> The holders of the outstanding shares of any class shall be entitled to vote as a class upon a proposed amendment, whether or not entitled to vote thereon by the provisions of the articles of incorporation, if the amendment would:
>
> . . . .
>
> (h) Cancel or otherwise affect dividends on the shares of such class which have accrued but have not been declared (whenever accrued and whether or not earned).

Va. Code Ann. Section 13.1-59 (Repl. vol. 1964) governs issuance of certificates of amendment by the State Corporation Commission:

> The articles of amendment shall be delivered to the Commission. If the Commission finds that the articles comply with the requirements of law and that all required fees have been paid, it shall by order issue a certificate of amendment, which shall be admitted to record in its office.

Rules

Rule 5:1, Section 13 of the Rules of the Supreme Court of Appeals of Virginia deals with appeals from the State Corporation Commission. In relevant part it provides:

> No appeal shall be allowed unless, within sixty days after final order or judgment, counsel files with the clerk of the Commission a notice of appeal ....

Extracts from the Original V-C Charter

Article 4, subdivision II, paragraph 1 of V-C's original charter as adopted in 1926 made the right of preferred shareholders to dividends depend on dividends being declared by the directors but gave preferred shareholders a priority over common shareholders in the event that any dividends were declared:

> 1. The holders of the Preferred Stock shall be entitled . . . to receive, out of the surplus of the corporation . . . or out of the net earnings of the corporation, when and as declared by the board of directors of the corporation, dividends at the rate of . . . 6% per annum . . . in priority to any dividends on the Common Stock of the corporation . . . . From and after July 1, 1927, such dividends at the rate of 6% per annum on the Preferred Stock shall be cumulative. No dividend shall be paid or set apart for payment on the Common Stock of the corporation in any fiscal year, after July 1, 1927, unless and until all such accumulated dividends on the Preferred Stock for all previous fiscal years subsequent to July 1, 1927, shall have been paid or set apart for payment in full, but without interest, nor unless and until full dividends on the Preferred Stock for the current and all preceding dividend periods of the current fiscal year either shall have been paid or set apart for payment . . . .

Article 4, subdivision II, paragraph 5 of the original charter allowed changes in the preferences of the preferred stock so long as two-thirds of the outstanding preferred shares were voted for such changes. This provision was still in the V-C charter at the time of the 1962 amendment, save that the words "at least two-thirds" had been changed to "more than two-thirds" in a charter restatement in 1960. (Record No. 6293, p. 51.)

> Without the affirmative vote or written consent of the holders of at least two-thirds in amount of the Preferred Stock at the time outstanding, the corporation shall not . . . alter or change the preferences of such Preferred Stock . . . .

Article 8, paragraph 11 of the original (1926) charter reserved to the corporation the right to amend its charter in such manner as was then or might thereafter be allowed by law. (This provision was still in the charter at the effective date of the Virginia Stock Corporation Act on January 1, 1957. It was deleted in 1960, since the new Act gave the corporation the same powers which it enjoyed under this provision of its charter.)

> The following provisions are inserted . . . for further creating, defining, limiting, and regulating the powers of the corporation, its directors, and its stockholders:
>
> . . . .
>
> 11. The corporation reserves the right to amend, alter, change or appeal any provisions contained in this certificate in the manner now or hereafter prescribed by law, subject to the provisions of . . . paragraph 5 of sub-division II of Article Fourth hereof [set out above], and all rights conferred on stockholders hereunder are granted subject to this provision.